

## American Ecology

STEPHEN A ROMANO  
President and  
Chief Operating Officer

March 27, 2002

Ms. Jean Jennings  
Contract Administrator  
U.S. Army Corps of Engineers  
CENWK-PM-ES  
601 East 12<sup>th</sup> Street  
Kansas City, MO 64106

Re: Army Corps of Engineers Remedy Selection Authority for FUSRAP

Dear Ms. Jennings:

We write to request that the Army Corps of Engineers ("Corps") confer with the Nuclear Regulatory Commission ("NRC") on what we consider to be a significant NRC misinterpretation of Congressional intent regarding FUSRAP remedy selection.

We believe NRC staff's September 20, 2001 letter to Envirocare effectively requiring disposal of FUSRAP waste from the Maywood site at an NRC licensed 11.e(2) facility erodes the Corps' Congressionally granted authority to select remedies pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). CERCLA contains broad authority for implementing agencies to enter Records of Decision and implement remedies irrespective of other environmental laws.

When Congress assigned the Corps authority to manage FUSRAP wastes in the 1998 Energy and Water Development Appropriations Act, it excluded NRC authority under the Uranium Mill Tailings Radiation Control Act. The 1999 Energy and Water Development Appropriations Act clearly affirmed this exclusion and further specified that Corps FUSRAP decisions fall under CERCLA authority. The 2001 appropriations language contains similar CERCLA language, further clarifying Congressional intent that the Corps has final remedy authority for FUSRAP waste not currently licensed by the NRC.

The September 20, 2001 position by NRC staff that pre-1978, non-11.e(2) licensed material at Maywood must necessarily be classified and managed as if was so licensed is contrary to this body of law. Staff's interpretation diminishes the Corps' independent authority to determine FUSRAP remedies. We do not believe the Corps should acquiesce in this erosion or its potential unintended consequences on future FUSRAP decisions.

NMSS 22  
Add: Mike Weber  
Paper 9

With respect to Maywood, about 20% of the waste to be shipped for disposal is regulated under an NRC 11.e(2) license. Only that material must necessarily be disposed of at an 11.e(2) facility. The remaining 80% of the waste is not governed by an 11.e(2) license, and its disposition is subject to the Corps' sole authority pursuant to acts of Congress.

Unquestionably, the Corps has authority to direct all Maywood wastes to an 11.e(2) disposal site if it determines this is in the best interests of the government for economic or other reasons. However, it also follows that the Corps has independent authority to decide that materials not licensed by the NRC may be disposed of at a non-11.e(2) facility permitted to accept wastes in the waste form and isotopic concentrations involved. There is no reason or need to "classify" the waste beyond verifying that it is pre-1978, unlicensed material. The Corps' Congressionally granted flexibility may well become important should economical access to 11.e(2) disposal sites become an issue.

NRC staff views that the agency "could have" licensed the entire Maywood site have no bearing. The NRC does not license the entire site, and never has. Whether or not the material is "11.e(2) like" also has no legal bearing. And since wastes with the same basic properties as the Maywood waste are now being safely disposed at non-11.e(2) facilities, creating such an artificial distinction offers no practical public health and safety meaning.

We were disappointed that NRC addressed this policy issue through a letter to one Corps contractor seeking a competitive advantage on the Maywood job. That said, we commend the Corps and the NRC for working together on FUSRAP matters, and believe the Memorandum of Understanding entered by the two agencies properly orders their respective relationships by involving NRC in an advisory capacity while preserving the Corps' decision-making authority. In light of the foregoing, we respectfully request that the Corps and the NRC confer on this matter of Corps authority without Envirocare, our company, or any other Corps contractor present to appropriately clarify the matter.

American Ecology is proud to serve the FUSRAP program and hopes this letter is received in the open and constructive manner in which it is intended. Please contact us if we can be of any further assistance.

Sincerely,



Stephen A. Romano  
President and Chief Executive Officer

cc: Richard Meserve, Chairman, and Members, Nuclear Regulatory Commission  
Tom Urbaniak, FUSRAP Program Manager, USACE, Kansas City  
Ann Wright, Counsel, USACE, Omaha  
Tommiann McDaniel, FUSRAP Team Leader, USACE, Washington, D.C.  
Michael Weber, Nuclear Regulatory Commission